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No. 06-5247

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In The

Supreme Court of the United States

JOHN F. FRY,

Petitioner,

v.

CHERYL K. PLILER, Warden,

Respondent.

On A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONER 1

I. THE PREJUDICIAL IMPACT OF *CHAMBERS* ERROR MUST BE ASSESSED UNDER THE *CHAPMAN* STANDARD BY AT LEAST ONE REVIEWING COURT 2

A. The Holding in *Brecht* Does Not Extend to Cases in Which There Has Been No Prior *Chapman* Review 3

B. A Critical Component of the Rationale of *Brecht* Is That the *Chapman* Standard Need Not Be Applied on Federal Habeas When a State Court Has Already Conducted *Chapman* Review 5

C. The Passage of AEDPA Does Not Support Application of the *Brecht* Standard in a Federal Habeas Case in Which There Has Been No *Chapman* Review in State Court 6

D. The Manner of Review on Federal Habeas Depends Upon What Occurred (Or Did Not Occur) in State Court, Such as the Failure of a State Reviewing Court to Conduct *Chapman* Harmless-Error Analysis 7

II. THE *CHAMBERS* ERROR IN THIS CASE IS NOT HARMLESS UNDER THE *BRECHT* STANDARD 9

A. The Gun 9

B. The Jailhouse Informant 11

TABLE OF CONTENTS – Continued

Page

C. The Two Prior, Evenly-Divided Hung Juries 13

D. The Declaration of Deadlock During Deliberations in the Third Trial 14

E. The Jury's Request for Further Instruction Concerning Reasonable Doubt 15

F. The Extraordinarily Lengthy Deliberations in the Third Trial 15

G. Disinterested Eyewitness Testimony that Someone Other Than Mr. Fry Was the Killer 16

H. The Nature of the Error 18

CONCLUSION 20

APPENDIX

A. Argument VII of Appellant's Opening Brief, *People v. Fry*, California Court of Appeal, First Appellate District, Division Three, Docket No. A072396 ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Washington, 434 U.S. 497 (1978) 13, 16

Atwood v. Mapes, 325 F.Supp.2d 950 (N.D. Iowa 2004) 4

Austin v. United States, 513 U.S. 5 (1994) 3

Bains v. Cambra, 204 F.3d 964 (CA9 2000) 4

Brecht v. Abrahamson, 507 U.S. 619 (1993) ..... *passim*

Chambers v. Mississippi, 410 U.S. 284 (1973) ..... *passim*

Chapman v. California, 386 U.S. 18 (1967) ..... *passim*

Clinton v. Jones, 520 U.S. 681 (1997) 3, 4

Dallago v. United States, 427 F.2d 546 (CADC 1969) 16

Daniels v. Burke, 83 F.3d 760 (CA6 1996) 13

Duncan v. Henry, 513 U.S. 364 (1995) 7

Edelman v. Jordan, 415 U.S. 651 (1974) 4

Evitts v. Lucey, 469 U.S. 387 (1985) 3

Fulcher v. Motley, 444 F.3d 791 (CA6 2006) 13

Gibson v. Clannon, 633 F.2d 851 (CA9 1980) 16

Green v. United States, 355 U.S. 184 (1957) 13

Holmes v. South Carolina, 126 S.Ct. 1727 (2006) 19

Horsley v. Alabama, 45 F.3d 1486 (CA11 1995) 4

Kotteakos v. United States, 328 U.S. 765 (1946) ..... *passim*

Lyons v. Johnson, 912 F.Supp. 679 (S.D.N.Y. 1996) 4

Medina v. Barnes, 71 F.3d 363 (CA10 1995) 15

TABLE OF AUTHORITIES – Continued

Page

Mitchell v. Esparza, 540 U.S. 12 (2003) 3, 8

Monsanto v. United States, 143 F.Supp.2d 273 (S.D.N.Y. 2001) 4

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 18

On Lee v. United States, 343 U.S. 747 (1952) 12

Osborne v. United States, 351 F.2d 111 (CA8 1965) 16

Parker v. Gladden, 385 U.S. 363 (1966) 16

People v. Cudjo, 6 Cal.4th 585, 863 P.2d 635, 25 Cal.Rptr.2d 390 (1993) 6

People v. Laino, 32 Cal.4th 878, 87 P.3d 27, 11 Cal.Rptr.3d 723 (2004) 11

Plascencia v. Alameida, 467 F.3d 1190 (CA9 2006) 13

Reed v. Ross, 468 U.S. 1 (1984) 3

Rickman v. Bell, 131 F.3d 1150 (CA6 1997) 4

Rickman v. Dutton, 864 F.Supp. 686 (M.D. Tenn. 1994) 4

Ross v. Moffitt, 417 U.S. 600 (1974) 3

United States v. Bernal-Obeso, 989 F.2d 331 (CA9 1993) 12

United States v. Jean-Baptiste, 166 F.3d 102 (CA2 1999) 15

United States v. Lewis, 651 F.2d 1163 (CA6 1981) 15

United States v. Varoudakis, 233 F.3d 113 (CA1 2000) 14

Wainwright v. Witt, 469 U.S. 412 (1985) 8

Williams v. Taylor, 529 U.S. 362 (2000) 7

TABLE OF AUTHORITIES – Continued

Page

Williamson v. United States, 512 U.S. 594 (1994) 19

Zappulla v. New York, 391 F.3d 462 (CA2 2004) 13

CONSTITUTIONAL PROVISIONS

Article III, U.S. Const. 3

Article VI, U.S. Const. 2

STATUTES AND RULES

28 U.S.C. § 2254 ..... 4, 5, 6, 7

28 U.S.C. § 2255 4

California Penal Code §§ 1000.6-1000.11 (former) 11

OTHER

Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 Colum. L. Rev. 801 (2004) 12

Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem*, 129 U. Pa. L. Rev. 701 (1981) 14

Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* (5th ed. 2005) 4, 5

Natapoff, *The Faces of Wrongful Conviction Symposium: Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U.L. Rev. 107 (2006) 13

Scheck, Neufeld & Dwyer, *Actual Innocence* (2000) 13

TABLE OF AUTHORITIES – Continued

Page

Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 78 Hastings L. J. 1381 (1996) 12

Winograde, *Jailhouse Informants and the Need for Judicial Use Immunity in Habeas Corpus Proceedings*, 78 Calif. L. Rev. 755 (1990) 12

REPLY BRIEF FOR PETITIONER

In their rush to read *Brecht*[1] as deciding a question it did not reach, respondent and its *amici* overlook the posture the case was in when it came to the Court. *Brecht* adopted the *Kotteakos*[2] standard within a context in which *Chapman*[3] review had been conducted in state court. A critical component of the rationale for adopting this standard on federal habeas is that there is no need for a federal court to duplicate a state court's harmless-error analysis. Because, as respondent concedes, no *Chapman* review was conducted during Mr. Fry's state court appeal, extending the holding in *Brecht* to this case would be inconsistent with the factual moorings and rationale of *Brecht*.

Chapman harmless-error analysis is mandated on direct review in cases such as Mr. Fry's, where *Chambers*[4] error occurred in a state jury trial. The exacting *Chapman* standard provides a necessary safeguard against erroneous convictions of innocent defendants. If state courts fail to assess the effect of *Chambers* error under the *Chapman* standard, the duty to do so falls upon a federal habeas court. Indeed, *Chapman* review by the federal court in such a case is a necessary element of reviewing the state trial *and appellate* proceedings.

If the *Chambers* error in this case is held to be subject to review under the *Brecht-Kotteakos* standard, because this case is on federal habeas review, the error still must be deemed prejudicial. After nine days of deliberations in Mr. Fry's third trial, and after casting four ballots, the jurors indicated that they were deadlocked seven-to-five.

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[1] *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

[2] *Kotteakos v. United States*, 328 U.S. 765 (1946).

[3] *Chapman v. California*, 386 U.S. 18 (1967).

[4] *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Thus, well into the deliberations, at least five jurors had voted that Mr. Fry was not guilty. Notwithstanding respondent's contention that the evidence against Mr. Fry in the third trial was stronger than the evidence against him in the first two trials, the jury plainly viewed the case as a close one. Furthermore, as the panel majority in the Ninth Circuit found, the unconstitutionally excluded evidence "would have substantially bolstered [Mr. Fry's] claim[] of innocence." J.A. 212 (internal quotation marks omitted). Thus, the injurious effect of keeping that evidence from the jury in this case is self-evident.

I. THE PREJUDICIAL IMPACT OF *CHAMBERS* ERROR MUST BE ASSESSED UNDER THE *CHAPMAN* STANDARD BY AT LEAST ONE REVIEWING COURT.

Respondent argues that it does not matter now whether Mr. Fry's conviction would have been reversed in the state appellate court had *Chapman* been applied. Resp. Br. at 10, 14, 20. According to respondent, because this case is now on collateral review in federal court, a state court's erroneous failure to apply the *Chapman* standard is irrelevant to the issues on federal collateral review. Resp. Br. at 21-22.

Respondent and its *amici* have offered no sound justification to apply the *Brecht-Kotteakos* standard in a case such as the instant case. When a trial court unconstitutionally excludes evidence that someone other than the accused committed the charged crime, the accused is entitled, under the terms of *Chapman*, and under the rationale of *Brecht*, to have at least one reviewing court assess the effect of that error under the *Chapman* standard.[5] If a state court fails to adhere to its Article VI duty

[5] The right of one convicted of crime to have the effect of constitutional error reviewed under this exacting standard is coextensive with

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to apply this constitutional safeguard, *Brecht*, 507 U.S. at 636, it is incumbent upon an Article III court to do so. *Reed v. Ross*, 468 U.S. 1, 10 (1984).[6] This conclusion follows not only from basic fairness and the need to give effect to this Court's decision in *Chapman*, but also from the fact that collateral review of state proceedings includes review of a state appellate court's mode of harmless-error analysis, *Mitchell v. Esparza*, 540 U.S. 12, 17-19 (2003) (*per curiam*), as well as the underlying constitutional error. Respondent's position ignores the state appellate error and assumes that federal collateral review is focused solely on trial error.

A. The Holding in *Brecht* Does Not Extend to Cases in Which There Has Been No Prior *Chapman* Review.

This Court does not "decide abstract, hypothetical or contingent questions. . . ." *Clinton v. Jones*, 520 U.S. 681, 690 n. 11 (1997). Rather, this Court decides cases with

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the right to a trial without constitutional violations. *Chapman*, 386 U.S. at 21.

[6] Respondent states that Mr. Fry could have received *Chapman* review by filing a petition for a writ of certiorari in this Court following the California Supreme Court's denial of his petition for review, but that he did not seize upon that opportunity, thereby forsaking any entitlement he may have had to *Chapman* review. Resp. Br. at 21-22. However, Mr. Fry, who is indigent, had no right to counsel in connection with preparing a certiorari petition. *Austin v. United States*, 513 U.S. 5, 8 (1994); *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974). He is not versed in the "arcane art of preparing petitions for discretionary review. . . ." *Ross*, 417 U.S. at 616. Hence, to the extent respondent posits the theoretical possibility of Mr. Fry, without counsel, having received *Chapman* harmless-error analysis on direct review in this case, respondent's position is illusory. *See Evitts v. Lucey*, 469 U.S. 387, 396 (1985) ("An unrepresented appellant – like an unrepresented defendant at trial – is unable to protect the vital interests at stake.").

reference to the particular facts and issues before the Court. *Id.*; *Brecht*, 507 U.S. at 630-631 (citing *Edelman v. Jordan*, 415 U.S. 651, 670-671 (1974)). *Brecht* was decided on a record in which *Chapman* review had been conducted in state court. Respondent seeks to extend the holding in *Brecht* beyond that factual context, to a case in which no *Chapman* review was conducted in state court. However, this Court has "yet squarely to address" *Brecht*'s applicability in such a context. *Brecht*, 507 U.S. at 630.

If this Court had squarely addressed the issue, there would be no split of authority concerning the issue. Many courts and jurists have recognized that the holding in *Brecht* does not extend to cases in which there has been no prior *Chapman* review.[7]

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[7] The Eighth Circuit and several district courts have held that *Chapman*, rather than *Brecht*, applies when a federal habeas court is the first to conduct harmless-error review under *Chapman*. 2 R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 31.1, at 1507 n. 19 (5th ed. 2005) (collecting cases from the Eighth Circuit); *Atwood v. Mapes*, 325 F.Supp.2d 950, 975-976 (N.D. Iowa 2004); *Lyons v. Johnson*, 912 F.Supp. 679, 687-689 (S.D.N.Y. 1996), *aff'd.*, 99 F.3d 499 (CA2 1996); *Rickman v. Dutton*, 864 F.Supp. 686, 712 (M.D. Tenn. 1994), *aff'd. sub nom., Rickman v. Bell*, 131 F.3d 1150 (CA6 1997); *see also Monsanto v. United States*, 143 F.Supp.2d 273, 286 (S.D.N.Y. 2001) (holding the *Brecht* standard to be inapplicable in a 28 U.S.C. § 2255 case in which no prior *Chapman* review has been conducted), *aff'd.*, 348 F.3d 345 (CA2 2003), *cert. denied*, 543 U.S. 831 (2004). A number of circuit judges have dissented from holdings that *Brecht* applies when there has been no *Chapman* review in state court. *See, e.g., Bains v. Cambra*, 204 F.3d 964, 982 n. 4 (CA9) (Canby, J., dissenting) (noting that rejection of the *Chapman* standard in 28 U.S.C. § 2254 cases in which state courts have failed to conduct harmless-error review under *Chapman* "appears to be inconsistent with the underlying rationale of *Brecht*"), *cert. denied*, 531 U.S. 1037 (2000); *Horsley v. Alabama*, 45 F.3d 1486, 1498 n. 3 (CA11) (Thatchett, J., dissenting), *cert. denied*, 516 U.S. 960 (1995).

B. A Critical Component of the Rationale of *Brecht* Is That the *Chapman* Standard Need Not Be Applied on Federal Habeas When a State Court Has Already Conducted *Chapman* Review.

As framed by the Court, the very issue under consideration in *Brecht* was "whether *the same* harmless-error standard that *the state courts applied* on direct review" applies on federal habeas review. *Brecht*, 507 U.S. at 635-636 (italics added). This issue was resolved in light of, rather than in spite of, the fact the state courts had conducted *Chapman* review. *Id.* at 636; Pet. Br. at 24-25. Thus, contrary to respondent's position, Resp. Br. at 10, 14, 20, the fact that *Chapman* review had been conducted by the state courts in *Brecht* was integral to the holding in *Brecht*. The Court's discussion regarding the significance of the state-court *Chapman* review was not a "minor, makeweight" portion of the decision. CJLF Br. at 7-8.[8]

Unlike the situation in *Brecht*, respondent concedes that no *Chapman* review was conducted in state court in this case. Missouri Br. at 10.[9] Thus, the key rationale that

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[8] Although this Court's holding in *Brecht* was based on other considerations, including principles of finality, federalism, and comity, which are germane across the spectrum of § 2254 cases, the fact remains that "the *Brecht* majority apparently premised these justifications on an assumption that a finding of harmlessness by the state courts under the more stringent *Chapman* rule always will precede habeas corpus review of the harmlessness question under the less stringent *Brecht* rule. . . ." 2 Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* § 31.1, p. 1507 n. 17.

[9] Respondent asserts that its concession that no *Chapman* review was conducted in state court is attributable to a purported concession by Mr. Fry during direct review. According to respondent, Mr. Fry conceded in the state appellate court that California's harmless-error standard for non-constitutional error, rather than the *Chapman* standard, "was the controlling standard[.]" Resp. Br. at 7 n. 3. Mr. Fry made no such concession. To the contrary, his appellate counsel argued that California cases which apply a *Kotteakos*-type harmless-error

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led to this Court's adoption of the *Kotteakos* standard in *Brecht* is not present in the instant case.

Furthermore, limiting application of the *Brecht-Kotteakos* standard to cases in which there has been state-court review under *Chapman* will retain *Chapman*'s essential role as a safeguard against erroneous convictions of innocent defendants, Pet. Br. at 28-29; Inn. Net. Br. at 9-16, thereby preventing "unfair and mischievous results. . . ." *Chapman*, 386 U.S. at 22.

C. The Passage of AEDPA Does Not Support Application of the *Brecht* Standard in a Federal Habeas Case in Which There Has Been No *Chapman* Review in State Court.

Respondent suggests that the post-*Brecht* congressional curtailment of the range of federal habeas relief brought about by AEDPA fortifies the position that *Brecht* applies across the board. Resp. Br. at 26-30. The provisions of AEDPA that purportedly support this proposition are contained in 28 U.S.C. § 2254(d). These provisions limit the availability of federal habeas relief to petitioners whose claims were adjudicated in state court in a manner contrary to this Court's precedent and/or in a manner that involved an objectively unreasonable determination of the facts or an objectively unreasonable application of this Court's precedent. *Id.* In a case such as Mr. Fry's, where a

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standard in reviewing *Chambers* error "make[] no sense[,]" and that the *Chapman* standard is applicable in such cases, for the reasons expressed by Justice Kennard in her dissenting opinion in *People v. Cudjo*, 6 Cal.4th 585, 637-642, 863 P.2d 635, 25 Cal.Rptr.2d 390 (1993). *See* Appellant's Opening Brief at 106-108, *People v. Fry*, Docket No. A072396, California Court of Appeal, First Appellate District, Division Three. (A copy of the relevant portion of the state appellate brief, which was included in the record in the district court and the Ninth Circuit, is attached hereto as Appendix A.)

state appellate court failed to identify constitutional error and failed to review the effect of the error pursuant to the *Chapman* standard, but instead applied a *Brecht*-like standard,[10] § 2254(d)'s threshold limitations have been overcome. No provision of AEDPA calls for application of a particular harmless-error standard once a petitioner has passed through § 2254(d)'s gateway. In fact, a federal court's application of *Brecht* rather than *Chapman* in a case where the state court's failure to apply *Chapman* was cognizable error under AEDPA would at once condemn and ratify the error.

D. The Manner of Review on Federal Habeas Depends Upon What Occurred (Or Did Not Occur) in State Court, Such as the Failure of a State Reviewing Court to Conduct *Chapman* Harmless-Error Analysis.

Respondent seems to suggest that it is a novel idea for federal court treatment of a habeas claim to be dependent upon antecedent state action. Resp. Br. at 19-23. It is not. For example, a federal habeas court's application of 28 U.S.C. § 2254(d) depends on whether there was a state court adjudication of the claim on the merits. *Williams v. Taylor*, 529 U.S. 362, 404 (2000). If the state court did adjudicate the claim on the merits, but applied the wrong legal standard, a federal habeas court is "unconstrained" by § 2254(d). *Id.* at 406.[11] Thus, there is ample support not

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[10] Pet. Br. at 11; Resp. Br. at 7 n. 3; *Duncan v. Henry*, 513 U.S. 364, 370 n. 1 (1995) (Stevens, J., dissenting) (noting, with reference to the standard applied by the state appellate court in the instant case, that it is "essentially the same" as *Brecht*).

[11] Similarly, in the procedural default context, a federal habeas court's application of a procedural bar, on the basis of a petitioner's failure to comply with a state procedural rule, is dependent upon the state court actually applying the procedural bar. If the state court did not

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only in *Brecht*, but also elsewhere in this Court's habeas jurisprudence, for tying a particular mode of federal habeas review to the state judiciary's application or non-application of relevant legal principles.

A federal habeas court's treatment of a habeas claim involving a harmless-error issue depends upon how the issue was handled by the state appellate court. *Mitchell v. Esparza*, 540 U.S. at 17-19. However, respondent and its *amici* suggest that the manner in which a federal habeas court conducts harmless-error review "does not depend on whether the state court first undertook a harmless-error inquiry." Resp. Br. at 14; U.S. Br. at 21-22; Missouri Br. at 5-6; CJLF Br. at 6. This position artificially isolates the constitutional error at trial from constitutional error in the state reviewing court.

When a federal court reviews a state appellate decision in which the state court applied *Chapman*, but did so in an unreasonable manner, the federal court needs to determine what the outcome would have been in the state court had *Chapman* been reasonably applied. *Mitchell v. Esparza*, 540 U.S. at 18 ("habeas relief is appropriate . . . if the [state appellate court] applied harmless-error review in an objectively unreasonable manner"). Similarly, when a federal court reviews a state appellate decision in which the state court failed to apply *Chapman*, it is necessary for the federal court to determine what the result would have been had *Chapman* been applied.[12] Thus, even if federal habeas review of this nature were susceptible of being conducted under the auspices of the *Brecht-Kotteakos* standard, that review would necessarily entail an indirect *Chapman* analysis: The petitioner would not be entitled to relief if application of *Chapman* in the state court would

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do so, a federal habeas court is free to consider the merits of the petitioner's claim. *See Wainwright v. Witt*, 469 U.S. 412, 431 n. 11 (1985).

[12] A possible alternative would be a remand to state court with directions to conduct a *Chapman* harmless-error inquiry.

not have resulted in reversal. However, the petitioner would be entitled to relief if application of the *Chapman* standard in the state court would have resulted in reversal, because in such a case, the failure to apply *Chapman* would have resulted in substantial injury.

II. THE *CHAMBERS* ERROR IN THIS CASE IS NOT HARMLESS UNDER THE *BRECHT* STANDARD.

In arguing that the *Chambers* error here was harmless, respondent places great significance on two categories of evidence introduced in the third trial but not in the first two trials, namely, Mr. Fry's gun (and related ballistics testimony) and the testimony of a jailhouse informant. Resp. Br. at 32, 36. The simple response is that the jury in the third trial spent 23 days in deliberations,[13] and, after day nine, had declared itself deadlocked. Thus, from the jury's perspective, the case was close even with the new evidence. Further, on closer analysis than that offered by respondent, it is apparent that the new evidence did not strengthen the prosecution's case.

The prior, evenly-divided hung juries, the third jury's declaration of deadlock, its request for clarification of the reasonable doubt standard, the exculpatory evidence actually admitted, and the nature of the unconstitutionally excluded testimony, are all circumstances that militate against a finding of harmlessness under any prejudice standard.

A. The Gun

Respondent and its *amici* state as undisputed fact that Mr. Fry's gun, which was discovered during the third trial, was the murder weapon. Resp. Br. at 1 (referring to

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[13] Respondent states that the jury deliberated for 24 court days. Resp. Br. at 36. The district court calculated that there were 23 court days of deliberations. J.A. 198.

Mr. Fry's gun as "the murder weapon"); Missouri Br. at 1 (same); U.S. Br. at 3 (asserting that the evidence "established that one of the bullets recovered from the victims had definitely been fired from petitioner's gun"). Not so.

Although a criminalist called by the prosecution testified that Mr. Fry's gun was the murder weapon, a defense ballistics expert, whom the prosecution conceded to be credible, testified that Mr. Fry's gun could not be identified as the murder weapon. Pet Br. at 5-6 & n. 3; Tr. 4516, 4518-4519, 4546. The defense ballistics expert, Charles V. Morton, has impressive credentials. Mr. Morton has a Master's Degree in criminalistics from the University of California at Berkeley. Tr. 4504. As of the time of his testimony in Mr. Fry's third trial, he had been involved in firearm identification for over 30 years. He has qualified to testify as a ballistics expert for both the prosecution and the defense in numerous cases in many state and federal courts. Tr. 4506. In 1975, Mr. Morton was one of five criminalists from around the country selected to re-examine the ballistics evidence in the Robert F. Kennedy assassination. Tr. 4525, 5069.

Moreover, there was evidence that a possible cohort of Mr. Hurtz's in the murder of the Bells, was in possession of Mr. Fry's gun after the murders. The defense adduced evidence that this cohort, Darryl Borelli, had met with Mr. Hurtz "at a Denny's [restaurant] in order to plan the homicides. . . ." J.A. 173. However, the trial court excluded the evidence proffered by the defense concerning Mr. Borelli's post-homicide possession of the gun. J.A. 98-101; Tr. 525, 553-554, 4762. The state appellate court held that the trial court erred by excluding this evidence, but treated the error as harmless under the California standard for reviewing non-constitutional errors. J.A. 98, 106-107, 192-193.

Thus, the gun may or may not have been the murder weapon, and even if it were, there is evidence that, after the murders occurred, it was in the possession of an

individual who may have participated in the murders with Mr. Hurtz. Such being the case, the gun hardly bolsters respondent's position that the State's case was sufficiently strong to render the unconstitutional exclusion of Ms. Maples' testimony harmless.

B. The Jailhouse Informant

A jailhouse informant, Robert Jacobitz, testified in the third trial that Mr. Fry confessed to him that he had planned and carried out the shooting of the Bells. Tr. 973-985. However, Mr. Jacobitz's testimony was unreliable, and it does not support respondent's position vis-à-vis the harmless-error inquiry.

Mr. Jacobitz has suffered numerous prior convictions, including convictions for robbery, burglary, grand theft, and transportation and sale of drugs. Tr. 937-938, 1004-1005, 1011-1013, 1110-1114, 1120, 1123, 4429-4431. In the period of time leading up to Mr. Fry's third jury trial, Mr. Jacobitz was incarcerated in the Solano County Jail on felony domestic violence charges. Tr. 937. During this period of time, he had contact with Mr. Fry, and he struck a deal with the State to testify against Mr. Fry. In exchange for his testimony, Mr. Jacobitz's felony domestic violence charges were reduced to misdemeanor charges, and the State agreed to 1) grant him a diversionary disposition,[14] 2) seek to avoid having his parole status revoked, and 3) secure his release from custody. Tr. 1004-1005, 1120, 1123, 4429-4431. Mr. Jacobitz also requested the State to assist him in obtaining a job upon his release from custody. Tr. 1011-1012.

Much of Mr. Jacobitz's testimony simply tracked newspaper accounts regarding the case, to which he had

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[14] A diversionary disposition can result in dismissal of criminal charges. *See* former Cal. Penal Code §§ 1000.6-1000.11; *People v. Laino*, 32 Cal.4th 878, 897 n. 12, 87 P.3d 27, 11 Cal.Rptr.3d 723 (2004).

access. His testimony that Mr. Fry had purportedly shot James Bell three times is inconsistent with the undisputed testimony of the State's pathologist that eight bullet wounds were found during the autopsy of Mr. Bell. Tr. 1019-1026, 1509-1515, 5057. And, as Mr. Fry's trial counsel noted in closing argument, a stipulation between the parties revealed that Mr. Jacobitz was lying about the time frame in which he purportedly heard Mr. Fry making incriminating admissions. Tr. 5056. The prosecutor did not dispute this point in his summation.

Despite the foregoing circumstances, respondent suggests that the jailhouse informant testimony strengthened the prosecution case. If anything, however, the prosecution's resort to the testimony of a jailhouse informant unveils the prosecution's own understanding of the weakness of its case: Prosecutors "tend[] to use jailhouse informant testimony only when a case is 'weak[.]'" J. Winograde, *Jailhouse Informants and the Need for Judicial Use Immunity in Habeas Corpus Proceedings*, 78 Calif. L. Rev. 755, 757 (1990).

"The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility." *On Lee v. United States*, 343 U.S. 747, 757 (1952). "By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom." *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (CA9 1993); S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L. J. 1381, 1383 (1996).[15] Because dishonesty is a

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[15] *See* D. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 Colum. L. Rev. 801, 824

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common "characteristic" of jailhouse informants, state and federal courts have developed standardized jury instructions, explaining to jurors that the testimony of such individuals is to be viewed with great caution. *Plascencia v. Alameida*, 467 F.3d 1190, 1199 (CA9 2006).

In light of the foregoing, it is not surprising that courts conducting prejudice inquiries routinely disregard ostensibly damning testimony from jailhouse informants. *Fulcher v. Motley*, 444 F.3d 791, 810-811 (CA6 2006); *Zappulla v. New York*, 391 F.3d 462, 470 & n. 3 (CA2 2004), *cert. denied*, 126 S.Ct. 472 (2005). This Court should decline to follow respondent's suggestion to give great weight to the testimony of this jailhouse informant in the context of harmless-error analysis.

C. The Two Prior, Evenly-Divided Hung Juries

Because the gun evidence and the jailhouse informant testimony – i.e., the two items of evidence that respondent sees as distinguishing the third trial from the first two, Resp. Br. at 32, 36 – did not significantly strengthen the prosecution's case, the fact that there were two evenly-divided hung juries before the third trial remains a significant fact in the prejudice calculus. Pet. Br. at 30 & n. 22. As this Court has observed, "'repeated attempts to convict an individual for an alleged offense . . . enhanc[e] the possibility that even though innocent he may be found guilty.'" *Arizona v. Washington*, 434 U.S. 497, 504 n. 13 (1978) (quoting *Green v. United States*, 355 U.S. 184, 187-188 (1957)); *see also Daniels v. Burke*, 83 F.3d 760, 765 n. 3 (CA6 1996) (recognizing "the argument that the risk of

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(2004); A. Natapoff, *The Faces of Wrongful Conviction Symposium: Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U.L. Rev. 107 (2006); B. Scheck, P. Neufeld & J. Dwyer, *Actual Innocence*, 126-157 (2000) (documenting numerous miscarriages of justice resulting from testimony of "jailhouse snitches").

conviction of innocent people increases on retrial") (citing J. Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem*, 129 U. Pa. L. Rev. 701, 713 (1981) (risk of wrongful conviction increases on retrial)).

D. The Declaration of Deadlock During Deliberations in the Third Trial

After nine days of deliberations, the jury sent a note to the trial court indicating that it was deadlocked. Tr. 5154.5.[16] The court then brought the jurors into the courtroom and asked the foreperson whether there was any reasonable possibility that continued deliberations could result in a verdict. The foreperson responded: "It's my opinion, sir, that we are hopelessly deadlocked at this point." Tr. 5154.7. In response to further inquiry from the court, the foreperson indicated the jury had taken a total of four ballots. Tr. 5154.6. Then, in response to the court's inquiry as to the numerical division of the jury, the foreperson indicated, without specifying which way the jury was leaning, that the split was 7-5. Tr. 5154.6. Thereupon, the court proceeded to inquire with the individual jurors as to whether they believed the jury was hopelessly deadlocked. Eight jurors agreed with the foreperson's assessment of hopeless deadlock. One juror stated that she was undecided on the question. Two jurors indicated that they did not believe the deadlock to be hopeless. Tr. 5154.7-5154.8.

A jury's declaration of deadlock during deliberations is a circumstance that naturally tends to "weigh against a finding of harmless error." *United States v. Varoudakis*, 233 F.3d 113, 126 (CA1 2000). A "jury's 'impasse' note reveals uncertainty about . . . guilt." *Id.* at 127 (citing

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[16] In the pagination the reporter's transcript of the third trial, pages 5154.1 through 5154.10 are inserted in between pages 5154 and 5155.

Medina v. Barnes, 71 F.3d 363, 369 (CA10 1995)); *accord*, *United States v. Jean-Baptiste*, 166 F.3d 102, 109 (CA2 1999); *United States v. Lewis*, 651 F.2d 1163, 1169 (CA6 1981). Mr. Fry stressed in his opening brief that the jury's 7-5 deadlock during deliberations cuts against a finding of harmlessness. Pet. Br. at 30-31. Tellingly, respondent has offered no rejoinder.

E. The Jury's Request for Further Instruction Concerning Reasonable Doubt

The fact that the jurors also made a request during deliberations for the trial court to provide them with information about the reasonable doubt standard, beyond that contained in the court's charge to the jury, J.A. 121, is yet another indication that this jury viewed the case as close. Indeed, there would have been no need for the jury's request had the jury not been struggling with the question of guilt.

F. The Extraordinarily Lengthy Deliberations in the Third Trial

Three days before the jury returned its verdict, the trial court remarked that the jury had been given "a lot of time to deliberate, more than any other jury maybe in this county's history. . . ." Tr. 5315. Nevertheless, respondent suggests that, "[i]n context, the length of deliberations was not extraordinary." Resp. Br. 37. Whatever word one uses to describe the length of the deliberations, the fact remains that the jury deliberated for five weeks – over the course of 23 court days. J.A. 198. These deliberations followed the presentation of evidence over the course of 29 court days. J.A. 198. If, as respondent contends, the case against Mr. Fry was "very strong," Resp. Br. at 31, experience and common sense teach that it would not have taken 23 days for the jury to reach a verdict.

This Court has recognized that, in the case of "a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." *Arizona v. Washington*, 434 U.S. at 509. This risk was brought to bear in this case, as one of the jurors expressed concern to the trial court about losing her job due to the length of deliberations. J.A. 200; Tr. 5233.

In the context of harmless error analysis, courts have repeatedly characterized deliberations of substantially less duration as sufficiently lengthy to cut against a finding of harmlessness. In *Parker v. Gladden*, 385 U.S. 363 (1966) (*per curiam*), this Court found that 26 hours of deliberations following an eight-day trial "indicat[ed] a difference among [the jurors] as to the guilt of [the] petitioner." *Id.* at 365. In *Dallago v. United States*, 427 F.2d 546 (CADC 1969), where there was a six-week jury trial, and the jury deliberated for five days, the court observed that "one would expect that if the evidence of guilt was overwhelming the jury would have succumbed much sooner." *Id.* at 548, 559; *accord*, *Gibson v. Clannon*, 633 F.2d 851, 855 (CA9 1980); *Osborne v. United States*, 351 F.2d 111, 118 (CA8 1965).

In light of the foregoing, the *five weeks* of deliberations in Mr. Fry's third trial cannot be considered as anything other than a factor weighing heavily, if not decisively, against a finding of harmlessness.

G. Disinterested Eyewitness Testimony that Someone Other Than Mr. Fry Was the Killer

As noted in Mr. Fry's opening brief, a truck-driver from Missouri, Russell Carter, who does not know Mr. Fry, testified that he witnessed the murders, and that Mr. Fry was not the killer. Thus, Mr. Fry's trial counsel argued to the jury that Mr. Fry is innocent if Mr. Carter's eyewitness

testimony was accurate. Tr. 5080-5081. Respondent suggests that the truck-driver's testimony was unbelievable and contrary to all other evidence in the case concerning the time when the murders occurred. Resp. Br. at 35. Respondent is incorrect.

Mr. Carter approximated that he observed the murders occurring shortly after 6:00 a.m. Tr. 4573. Respondent notes that the Bells' bodies were discovered shortly before 7:00 a.m., and that there was evidence that the time of death was six to twelve hours earlier. Resp. Br. at 1. However, the evidence concerning time of death was inconclusive. A civilian, who was present at the scene at approximately 7:00 a.m., thought he saw James Bell move just before the police arrived. Tr. 606, 690-691. A pathologist called to testify by the prosecution opined that the Bells had been dead for approximately three to four hours before being found. Tr. 1541-1543, 5081. Hence, Mr. Fry's trial counsel argued to the jury that Mr. Carter's testimony was consistent with the time-of-death evidence. Tr. 5081. Even if Mr. Carter was off in his approximation of the time he observed the murders occurring, the fact of the matter is that he is a disinterested witness, with no motive to falsely exculpate Mr. Fry. In each of Mr. Fry's three jury trials, Mr. Carter testified that he saw the shooting occur, that he distinctly saw the shooter, and that the shooter is not Mr. Fry. Rather, the shooter is a man who is about half the size of Mr. Fry, and who, unlike Mr. Fry, has a full head of hair. Tr. 4571-4613, 4627-4667; *see also* Exhibits J & K to Mr. Fry's Amended Petition in the District Court.[17]

[17] Mr. Carter's testimony was corroborated by the testimony of another disinterested witness who had contact with Mr. Carter shortly after Mr. Carter witnessed the homicides. Tr. 4941-4942; Pet. Br. at 6.

H. The Nature of the Error

The trial court's exclusion of Ms. Maples' proffered testimony was *Chambers* error. J.A. 180, 212. Despite respondent's grudging refusal to acknowledge this constitutional error, Resp. Br. at 33-34 n. 8,[18] respondent's *amici* do not deny the error. U.S. Br. at 25 n. 11. The district court viewed the error as obvious. J.A. 179.[19] And, the panel majority in the Ninth Circuit acknowledged that admission of Ms. Maples' testimony "would have substantially bolstered [Mr. Fry's] claim[] of innocence." J.A. 212 (internal quotation marks omitted).

Nevertheless, respondent suggests that Ms. Maples' proffered testimony was not reliable because 1) she did not hear Mr. Hurtz say he killed the Bells, 2) she did not hear him identify the location of the killings, 3) she only heard portions of Mr. Hurtz's remarks, and 4) she did not know whether he was serious. Resp. Br. at 32-33. Therefore, according to respondent, the exclusion of Ms. Maples'

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[18] Respondent did not contend in its brief in opposition to the petition for certiorari herein that there was no *Chambers* error. And, as noted in the United States' *amicus* brief, "this case comes to the Court on the assumption that there was constitutional error. . . ." U.S. Br. at 25 n. 11. Hence, respondent's disavowal of constitutional error "now comes far too late." *See Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).

[19] With respect to the propriety of the state court's exclusion of Ms. Maples' testimony on the ground that there was purportedly no nexus between the double homicide in question and that which Ms. Maples heard Mr. Hurtz describing, the district court, after noting that Ms. Maples' proffered testimony was corroborated by the other witnesses who heard Mr. Hurtz making incriminating admissions, rhetorically asked: "Just how many double execution style homicides involving a female driver shot in the head and a male passenger also shot in a parked car could there have been in a community proximate to the victims' murder herein?" J.A. 179.

testimony was not prejudicial to Mr. Fry. However, statements such as those that Ms. Maples heard Mr. Hurtz making – third-party declarations against penal interest – are generally deemed inherently reliable, based upon "the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Williamson v. United States*, 512 U.S. 594, 599 (1994); *Chambers v. Mississippi*, 410 U.S. at 299. And, despite the fact that Ms. Maples did not hear Mr. Hurtz naming the two people he said he had killed, a number of other witnesses did testify that Mr. Hurtz had admitted to killing the Bells. J.A. 179. This is the same type of corroboration that was deemed to provide considerable assurance of reliability in *Chambers*. 410 U.S. at 298-301. Furthermore, as the panel majority in the Ninth Circuit noted, the portion of Mr. Hurtz's remarks Ms. Maples "did hear involved idiosyncratic facts exactly matching the facts surrounding the murder of Cynthia and James Bell." J.A. 212; Pet. Br. at 9 n. 9. Thus, in light of Ms. Maples' undisputed lack of bias, J.A. 212, respondent's argument that her proffered testimony lacked reliability rings hollow.

Finally, in one of the *amicus* briefs presented in support of respondent, it is acknowledged that *Chambers* error may be inherently prejudicial, i.e., that prejudice appears to be an element of a *Chambers* violation. CJLF Br. at 4-5. This may be the case. *Holmes v. South Carolina*, 126 S.Ct. 1727, 1735 (2006) (reversing without harmless-error analysis where "the petitioner proffered evidence that, if believed, squarely proved that [someone else], not petitioner, was the perpetrator"). Regardless of whether *Chambers* error is inherently prejudicial, the *Chambers* error in the instant case, like the *Chambers* error in *Holmes* and *Chambers* itself, prevented the factfinder from receiving evidence that, if believed, demonstrated the innocence of the accused. Such error cannot be considered

harmless in this case, even under the *Brecht-Kotteakos* standard, where the third jury struggled so mightily with the evidence. For, as Justice Stevens explained in his concurring opinion in *Brecht*, the *Kotteakos* standard is a "demanding" standard. *Brecht*, 507 U.S. at 641.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

March 12, 2007

Respectfully submitted,

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App. 1

Appellant's Opening Brief

Argument VII

People v. Fry

California Court of Appeal,
First Appellate District,
Division Three

Docket No. A072396

* * *

VII.

THE COURT DENIED APPELLANT'S RIGHT TO PRESENT A DEFENSE AND TO A FAIR TRIAL BY EXCLUDING THE TESTIMONY OF DEFENSE WITNESS PAMELA MAPLES WHO WOULD HAVE TESTIFIED THAT SHE HEARD TONY HURTZ SAY THAT HE KILLED TWO PEOPLE IN A MANNER THAT FIT THE KILLING OF THE BELLS.

A. Introduction

Defense counsel called Pamela Maples to the witness stand. Maples is Hurtz's cousin and testified that she does not know appellant. (RT 4137.) The prosecutor objected to Maples' testimony and the court allowed the prosecutor to voir dire her outside the presence of the jury. During that hearing, Maples testified that in April, 1994, she was present with Tammy, Hurtz and Steve when Hurtz said that he killed two people, a man and a woman. He said that he shot the woman first in the head, and then reached over and shot the man. They were in a parking place. He said there was blood everywhere and he ran into a field and threw himself in the mud before he called someone to pick him up. (RT 4138-4141.) Maples also testified that she was not present for the whole conversation and

did not know if he was serious or had made this up. (RT 4140.) She did not hear him say where or when this occurred. (RT 4142.)

The court ruled that there was an insufficient foundation to admit this evidence, finding that there were no other details other than the victims were in a car which connected the described act to the homicides in this case. (RT 4142-4144.) The prosecutor agreed [sic] that the scenario described was not unique, but defense counsel objected that there were sufficient details connecting the incident to the Bells and that the jury should be allowed to determine the weight of the evidence if they did not believe that there were adequate similarities. (RT 4144-4145.) In making this ruling, the court ignored the additional similarities, including that the victims description fit that of the Bells and the manner of death was also identical to the prosecutor's theory of the Bell homicide.

The court's exclusion of this evidence as not adequately connected to the homicides in question was incorrect and highly prejudicial. Maples' description of the incident was very close to what the prosecutor argued had happened to the Bells and was also the most descriptive evidence presented by the defense to connect Hurtz with the Bell homicide.

This court should hold that in combination with the other evidentiary errors made in this case and the obviously hard time the jury had reaching a verdict, the refusal to allow the defense to present additional evidence that Tony Hurtz confessed to committing these crimes, raises questions about the reliability of this verdict and requires reversal of appellant's convictions.

B. Legal Principles

As the trial court had already determined that the defense was entitled to present a third party culpability defense, and allowed it to present the testimony of other witnesses to the effect that both Hurtz and Borelli had admitted some involvement in the Bell homicides to various people, its ruling on the admissibility of Maples' testimony does not depend on whether such a defense was permissible. (*See People v. Cudjo, supra,* 6 Cal.4th at 609, citing *People v. McAlpin* (1991) 53 Cal.3d 1289, 1310, fn. 15.) Further the strength and credibility of the third-party-culpability evidence "is properly the province of the jury." (*People v. Hall, supra,* 41 Cal.3d at p. 834, cited in *People v. Cudjo, supra,* 6 Cal.4th at 610.)

Thus, the court erred in holding that there were insufficient factual similarities between the incident in which Maples overheard Hurtz was overheard describe [sic] a killing and the Bell homicides. The prosecutor's claim that this incident was not unique stretched credibility for several reasons. Hurtz's description of shooting a man and a woman while they were sitting in a car, and of shooting the woman and reaching over to then shoot the man is an exact description of the way in which the prosecutor's other witnesses described the homicide and the prosecutor himself argued the Bell homicide occurred. Additionally, because there was no evidence that there was any other incident that he could have been referring to, and also in light of the fact that other witnesses had heard Hurtz make similar statements referring to the Bells.

Whether Maples heard enough of the conversation to convince a jury that it occurred, and whether it was

referring to the Bells or some other extremely similar homicide (of which there was no evidence) was a jury question, not a matter for the court to reach in determining whether to allow the defense to present this evidence.

Therefore, just as in *Cudjo,* where the court based its decision to exclude a party's testimony for similarly improper reasons (in that case because the court determine [sic] that it did not believe the witness who would have testified to the third party's confession), the court committed error in excluding Maples's testimony. (*People v. Cudjo, supra,* 6 Cal.4th at 610.)

C. Prejudice

In *Cudjo,* the Supreme Court found that the court had erred in excluding defense testimony, but refused to find that the error was of constitutional magnitude. Over a vigorous dissent from Justice Kennard, the court ruled that the *Watson*[34] standard should be applied in determining prejudice. The court reasoned that a trial court is given discretion to rule on the admissibility of evidence, and every time a court improperly exercises that discretion under a "normal rule" it should not be found to have violated the federal constitution. (*People v. Cudjo, supra,* 6 Cal.4th at pp. 611.) The court supplied no analysis of its holding, and Justice Kennard's dissent pointed out that in exercising that discretion in Cudjo's trial the court had "unconstitutionally invaded the jury's function and denied defendant his right, under the compulsory process clause of the Sixth Amendment, to present witnesses in his behalf." (*People v. Cudjo, supra*, 6 Cal.4th at 611.)

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[34] *People v. Watson* (1956) 46 Cal.2d 818, 836.

Thus, with all due respect, the majority's analysis of the federal constitutional right to present a defense makes no sense and does not apply to the facts that were before it. The court cited numerous cases and their factual and procedural predicates to support its determination

> that the constitutional right to present and confront material witnesses may be infringed by *general rules of evidence or procedure* which preclude material testimony or pertinent cross-examination for arbitrary reasons, such as unwarranted and overbroad assumptions of untrustworthiness. However, the high court *has never suggested that a trial court commits constitutional error whenever it individually assesses and rejects a material defense witness as incredible.*

(*Ibid.*, emphasis added.)

The majority did acknowledge that the court had found in *Delaware v. Van Arsdall* (1986) 475 U.S. 673, that the court's preclusion of cross-examination for bias, based upon individual assessment of probative value against prejudice, violated the confrontation Clause. (*Id.* At 611.)

However, as Justice Kennard pointed out, the Supreme Court's analysis of the right to present defense witnesses as guaranteed by the compulsory process clause, only allows restrictions of that right which "'accommodate other legitimate interests in the criminal trial process'" and are not "arbitrary or disproportionate to the purposes they are designed to serve." (*Rock v. Arkansas, supra,* 483 U.S. 44.)

Justice Kennard then went on to disagree with the majority's analysis that a particular application of a

statute which resulted in depriving the defendant of the opportunity to present a witness where that restriction "was *not* reasonably necessary to further any legitimate governmental interest" was not a constitutional violation of the defendant's right to present a defense. *(People v. Cudjo, supra,* 6 Cal.4th at 610.) Justice Kennard found that the Sixth Amendment protection was violated when the trial court acted to prevent a witness from testifying, as was done in both this case and in *Cudjo,* and not merely when a State has passed a law which prevents defense evidence.

> Finally, I reject the majority's suggestion that there was no constitutional violation in this case because the defendant's witness was barred from testifying, not by a state statute or rule of evidence, but as a result of the trial court's erroneous application of state law. The suggestion amounts to an odd distortion of the nature and purpose of the constitutional guarantee. *What the state and federal Constitutions secure for the accused is the right to present a defense, not merely the right to be free of unduly restrictive state laws of evidence and procedure.* When, in this case, a crucial defense witness was not permitted to testify, defendant was denied that fundamental right.

(*Id.* At 641, emphasis added.) Justice Kennard went on to note that the *Chapman* test applied to the exclusion of defense testimony (*Ibid*, relying on *Crane v. Kentucky* (1986) 476 U.S. 683, and *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.) The appropriate inquiry under that standard is:

> "not whether, in a trial that occurred without the error, a guilty verdict would surely have been

> rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. ___, ___ [124 L.Ed.2d 182, 189, 113 S.Ct. 2078, 2081], original italics.)

(*People v. Cudjo, supra,* 6 Cal.4th at 642, Kennard, J., dissenting.)

In this case, an application of the *Chapman* standard will surely require reversal of appellant's convictions. As argued above (See Argument I, *ante),* this case was so close that there were three jury trials, and in this case, even with a jail house informant claiming that appellant had confessed and with the newly discovered gun which a prosecution expert claimed was the murder weapon, it took the jury five weeks to reach a guilty verdict. During that time they reported themselves deadlocked once and had their foreperson resign. They specifically asked the court questions indicating that they were considering the third party culpability evidence, including questions about the sighting of the various vehicles at the scene (See questions of May 5 and 31 [Stelzner and Peer]; May 11 [Tavares]; May 12 [Daraskovich];) autopsy evidence (May 11, Pettingill and Lipton; possession of appellant's gun (May 15, part 3 of request for appellant testimony) and ballistics evidence identifying appellant's gun as the murder weapon (May 23, Saggs and Morton testimony).

Not only because the testimony of an additional witness, and one related to Hurtz who did not know appellant, and whose testimony therefore would not be impeachable by evidence of a motive to assist appellant at Hurtz's expense (such as was present for many of the other witnesses such as BJ and Cynthia Caswell especially), and without any evidence of personal animosity towards Hurtz

(such as existed for the Eitreims and Hurtz's other girlfriends[)], it simply cannot be said that the verdict rendered "was *surely unatrributable* to the error."

Finally, because this case was so close and because of the factors outlined above, this error, in combination with the other evidentiary and procedural errors committed by the court, even under the *Watson* test, this verdict is suspect. Under *Watson,* this court must determine whether it is reasonably probable that admission of the testimony would have affected the outcome. As outlined above, because this case was so close and so difficult for the jury to decide, it cannot be said that it is not reasonably probable that the testimony of this witness who also heard Hurtz confess to these killings would not have altered the outcome of this case.

Reversal is required.

* * *